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Julie H. Gamotis  
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of

VIA FAX: 703-872-9306

PAUSTIAN et al.

Serial No.: 09/973,005

Art Unit: 3644

Filed: October 10, 2001

Examiner: S. Holzen

For: RAPID DEPLOYMENT OF TROOPS AND CARGO

REPLY BRIEF

To the Commissioner of Patents and Trademarks

Sir:

In response to the Examiner's Answer mailed January 13, 2005, kindly consider the following, which addresses matter raised for the first time in the Examiner's Answer:

- I. Applicant appreciates the statement of record under paragraph (3), page 2, wherein the Examiner expressly states **for the first time** that claims 29-47 are allowed and that claim 6 is objected to (assuming that it would be allowable if rewritten in independent form).

09/973,005

II. (a) The Examiner's allegations under paragraph 2. Section II, page 7 and paragraph 4. Section IV, page 15, that "applicant's assertions" is a "Red Herring" is baseless, arbitrary and capricious, preposterous, and is not well taken. "Red Herring", assuming the Examiner does not refer to the fish, is defined by Webster's Third New International Dictionary as: "a diversion intended to distract attention from the real issue." Such an allegation is disingenuous as shown by the file wrapper history.

(b) In fact, the entire history of this case proves otherwise and evidence of record shows that the Examiner failed to substantiate the real issue and unjustifiably delayed the prosecution of this case for more than a year by refusing to send the original appeal to the Board of Patent Appeals and Interferences ("Board") (see Petition filed December 5, 2003 outlining the details).

(c) The Board's attention is kindly drawn to each of the first non-final (mailed September 3, 2002), first final (mailed January 13, 2003), Applicant's first Appeal Brief (filed June 16, 2003), Examiner's second final (mailed April 28, 2004) office actions. Also, attention is specifically drawn to Applicant's Petition (filed December 5, 2003) which spelled out the ongoing problems faced by the Applicant. Not one of the office actions of record has complied with

the requirement dictated by the Court of Appeals for the Federal Circuit. The Federal Circuit has held that the patent office is obligated to make necessary findings and to provide an administrative record showing the evidence on which the findings are based, accompanied by the agency's reasoning in reaching its conclusion. In re Zurko, 59 USPQ2d 1693, 1697 (Fed. Cir. 2001). The decision "must be justified within the four corners of the record." In re Gartside, 53 USPQ2d 1769, 1774 (Fed. Cir. 2000).

(d) The evidence of record clearly shows that the Examiner has for the first time, in the Examiner's Answer (pp.812, 16), pointed out where Examiner finds teachings in the reference for features in the dependent claims as mandated by 35 U.S.C. 103 and by In re Ochiai, 37 USPQ2d 1127, 1133 (Fed. Cir. 1995): "A rejection under § 103 is proper only when "the PTO establishes that the invention **as claimed** in the application is obvious over cited prior art, **based on the specific comparison of that prior art with claim limitations.**" (emphasis added).

(e) The Examiner admits on pages 7 and 15:

"The examiner used the applicant's own patent against him, and in doing so did not deem it necessary to write out each and every limitation due to the fact that applicant's dependent claims recite verbatim the subject matter disclosed in his previous patent." (emphasis in original).

Applicant has tried to find a basis for this logic in 35 U.S.C, 37 CFR, MPEP, and case law and finds no basis in any statute/rule/regulation/guideline/case law for the Examiner's contention that using Applicant's own prior patent removes the need for Examiners to comply with the mandate dictated by 35 U.S.C. 103 and by In re Ochiai, In re Zurko, and In re Gartside, supra.

(f) Thus, the record provides ample evidence that the Examiner never met the initial burden of presenting a prima facie case of obviousness against the present claims and, therefore, never shifted the burden to Applicant to rebut such non-existent case. If examination at the initial stage does not produce a prima facie case of unpatentability, then without more the applicant is entitled to grant of the patent. In re Oetiker, 25 USPQ2d 1443, 1447 (Fed. Cir. 1992) citing In re Grabiak, 226 USPQ 870, 873 (Fed. Cir. 1985). Thus, the record reflects that the Examiner's contention that Applicant must "point out the difference between the prior art and the claims, ..." (Examiner's Answer pp. 7, 15) when the Examiner failed to meet the initial burden may indeed be the real "red herring."

CONCLUSION

For the above reasons, and for the reasons already submitted in the Appeal Brief, reversal of the Examiner and allowance of all the claims are respectfully requested.

Respectfully,



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